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Supreme Court, U.S.
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No. 01-1686

In the Supreme Court of the United States

CLASS FIVE NEVADA CLAIMANTS,
Petitioner,

v.

DOW CORNING CORPORATION, DEBTOR; OFFICIAL COMMITTEE OF TORT CLAIMANTS; THE DOW CHEMICAL COMPANY; CORNING, INCORPORATED; ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY BRIEF

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REPLY

Respondents raise two new allegations in their opposition, the first being that since the Sixth Circuit remanded the case to the bankruptcy court to determine whether its newly adopted six part third party discharge test was met, the petition may be mooted by those findings, and the second being that the Sixth Circuit's decision does not conflict with decisions in the Fifth, Ninth, and Tenth Circuits. Respondents are in error on both points.

1. Possibility of mootness does not preclude review.

The decision sought to be reviewed is a final judgment that the bankruptcy courts have authority to discharge non-debtors under certain circumstances, the remand relating only to the question of whether or not those circumstances exist under the facts developed at this stage of this case and under the present version of proponents' plan, a matter which the bankruptcy court is wholly without authority to determine and a matter which, in a case already pending for over 7 years, will likely and unnecessarily add at least another three years of delay, whichever way the bankruptcy court rules. Respondents' argument would presumably be the same had the sixth circuit empowered its bankruptcy courts to grant divorces, or coin money, both less remarkable than granting bankruptcy courts the power to permanently enjoin a creditor from seeking to hold a solvent third party liable for his own misconduct without first hearing the merits of the claim, and then saying that review by this court is precluded unless the court actually granted the divorce or printed its own currency. Though certiorari review of interlocutory orders of federal courts is available (28 U. S. C. §§1254(1) and 1292) it is true that "[w]e generally await final judgment in the lower courts before exercising our certiorari jurisdiction." *Virginia*

Military Institute et al., v. United States 508 U.S. 946 (1993) (J. Scalia, concurring).

Nonetheless in extraordinary cases, review of interlocutory judgments is available:

> Clearly, therefore, this court should not issue a writ of certiorari to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.

American Construction Company v. Jacksonville, Tampa and Key West Railway Company, 148 U.S. 372, 384 (1893)

This is such a case. Most of the claimants in this case have waited 9 years already (two years before 1995 when debtor below filed for bankruptcy). Further delay would embarrass the judiciary, or at least should. Justice delayed is justice denied. To grant petitioners the relief they seek (right to continue their pending state law actions against Dow Chemical) three years from now will be illusory as too many of them and their witnesses will, if not then dead, be nearly so. The federal judiciary is not a black hole in which to stuff the Nevadans, as respondents would have it.

If the bankruptcy court finds each of the six factors, and is upheld on appeal, the plan is then confirmed with the releases and no mootness sets in. If the bankruptcy court finds less than six of the factors, and is upheld on appeal, the petition is still not moot as Dow will claim that the plan is not effective and a new one must be drafted, that it should have an opportunity to draft a new plan to more properly meet the six factor test as those factors were not in existence when the present plan was filed. And on and on.

Further, it is not at all certain, in the context of bankruptcy law, that the Sixth Circuit's decision is

interlocutory. For purposes of effective review by this Court, it is about as final as a bankruptcy decision gets. In fact, by reason of the application of bankruptcy law principles rendering most appeals of orders confirming plans moot, where no stay is obtained, it is much more likely that mootness will prevent review if this petition is denied than if it is granted.

Section 7.2 of the plan, earlier lodged with this Court, provides that the plan becomes effective when the third party discharge issue is resolved in favor of proponents and is no longer subject to "appeal."

As a petition for certiorari is not an "appeal," the plan apparently becomes effective on final approval of the confirmation order by the Sixth Circuit. If it is confirmed and the effective date occurs, as above, the plan provides that disbursements begin immediately and, once implemented, appellate review is precluded by the special doctrine of mootness applicable to confirmed plans. See *City of Covington v. Covington Landing Ltd. Partnership*, 71 F.3d 1221, 1226 (6th Cir. 1995) (citing *In re UNR Indus.*, 20 F.3d 766, 769-70 (7th Cir. 1994) (recognizing that a plan of reorganization, once implemented, should not be disturbed except for compelling reasons).

By reason of the special nature of bankruptcy cases, the courts have developed special rules of finality.

> The problems of applying the final judgment rule to bankruptcy litigation with its numerous parties in interest and its adversary proceedings and contested matters makes 'The question of finality in bankruptcy appeals ... a thorny one,' although most courts agree that the concept of finality in bankruptcy is broader and more flexible than in ordinary civil litigation, and that determinations of finality in the context of

bankruptcy are dealt with 'in a more pragmatic and less technical sense than in other settings.'

Collier on Bankruptcy, 15th Ed. ¶5.07[1][a]

The two interlocutory judgment cases cited by respondents (*Brotherhood of Locomotive Firemen & Enginemen v. Bangor & A. R.R.*, 389 U.S. 327, (1967) and *Hamilton-Brown Shoe Co. v. Wolf Bros.*, 240 U.S. 251 (1916) provide good examples of the reasons for this rule. Not only did they, so far as can be determined, not involve, as here, an allegation that the remanded court had no authority to conduct the remanded proceedings, certiorari was not necessary to prevent needless and destructive delay. In *Brotherhood*, the contemptuous conduct occurred on March 31, 1966. Certiorari was denied December 11, 1967. In *Hamilton-Brown*, the complaint was filed in January of 1906 and certiorari was denied in April of 1909. *(Heckendorn v. The United States*, 214 U.S. 514 (1909)).

2. **Respondents' argument that the Sixth Circuit's decision does not implicate a split among the Circuits misrepresents the nature of that decision.**

The reader is left with the impression, on reviewing respondents' brief, that the main requirement of a third party release is a mass tort and that, in mass tort cases, the Circuits are all in accord. This is false and misleading. The Sixth Circuit carefully did **not** make "mass tort" one of the six elements which bankruptcy courts must find before confirming a plan which discharges nondebtors. To do so, to make "mass tort" a seventh element would be to give debtors who injure thousands the right to request a third party bankruptcy discharge while denying that right to debtors who injure only a few. The Nevadans claim that the Sixth Circuit's decision is unauthorized and unAmerican, not that it is

depraved. The Sixth Circuit's six elements operate without regard to whether the bankruptcy court is or is not considering a mass tort bankruptcy, and without regard to the number or type of claims. In this, as the Sixth Circuit itself expressly acknowledges, it is in direct conflict with at least the Ninth and the Tenth Circuits. *In re: Dow Corning Corporation, Debtor.* 280 F.3d 648, 657 (2002).

And it is also untrue that those Circuits which authorize bankruptcy courts to issue third party discharges do so only in mass tort cases. For examples of such non-mass tort/third party discharge cases in the Second Circuit, see *In re Gaston & Snow*, 1996 U.S. Dist. LEXIS 17774 (U.S.D.C.S.D.N.Y., 1996) (law firm liability); *In re Chateaugay Corporation*, 167 B.R. 776 (U.S.D.C.S.D.N.Y, 1994) (workers' compensation claims). For just one of many examples of such cases in the Fourth Circuit, see *In Re: Mac Panel Company* 2000 Bankr. LEXIS 1694 (Bankr. M.D.N.C., 2000), aff'd 283 F.3d 622, 626 (4th Cir. 2002) (There was only one creditor, the bankruptcy court noting: "The recognition of bankruptcy court jurisdiction in the *A. H. Robins* case is not rendered inapplicable in the present case on the grounds that mass tort litigation was involved in the Robins case," 2000 Bankr. LEXIS 1694 at p.23).

SUPPLEMENTAL MATTERS

1. The United States may seek certiorari of the decision.

Earlier this month the United States (Sixth Circuit companion case No. 01-1102) filed herein an Application for an Extension of Time to File a Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit seeking to preserve its right to seek certiorari of the same Sixth Circuit decision invoked by this petition, unless it and the plan proponents finalize pending settlement

negotiations. Throughout this litigation, the Nevadans and the United States have been closely aligned on the "authority" issue, the main difference, if it be one, being that the United States' rights against third parties abrogated by the Sixth Circuit were granted by federal rather than state law. That application attaches the Sixth Circuit's judgment (280 F.3d 648), and states, beginning at the bottom of page 6:

> Additional time is needed so that the Solicitor General may further evaluate the legal and practical consequences of the decision and, if the petition is authorized, to prepare and print it.
>
> First and most important, the United States is engaged in substantial and thus far productive settlement discussions with Dow Corning. Additional time is needed to determine whether a settlement in lieu of a request for further review is feasible and in the interests of the United States.
>
> Second, the scope of a bankruptcy court's equitable power to curtail a creditor's rights against parties other than the debtor presents a complex issue of substantial prospective significance. The significance of the issues presented requires additional time for consultation and consideration within the government.
>
> Finally, there is a considerable divergence in appellate authority on this question. Compare Matter of Zale Corp., 62 F.3d 746, 760 (5th Cir. 1996); In re Lowenschuss, 67 F.3d at 1401, In re American Hardwoods, Inc., 885 F.2d 621, 626 (9th Cir. 1989), and In re Western Real Estate, Inc., 922 F.2d at 601-02, with In re A. H. Robins, Inc., 880 F.2d 694, 702 (4th Cir.), cert. denied, 493 U.S. 959 (1989), and In re Drexel Burnham Lambert Group, Inc., 960 F.2d

285, 293, cert. denied, 506 U.S. 1088 (1993). The complexity of the issue and divergence in results and reasoning in the courts of appeal require additional time to determine whether to request further review of the issue at this time.

Zale, Lowenschuss[1], and *In re Western Real Estate* are cited at page 16 of the petition. *Robins* and *Drexel Burnham* are cited at page 19 of the petition.

2. **WorldCom**

WorldCom is a Mississippi corporation based in Clinton, Mississippi. On July 21, 2002, WorldCom filed its chapter 11 petition. It filed in the release friendly Second Circuit (see *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 293 (2nd Cir. 1992)), rather than in its home Circuit, the release unfriendly Fifth Circuit (*In re Zale Corporation,* 62 F.3d 746, 761 (5th Cir. 1995)). Schedule 7 to the affidavit of WorldCom's Senior Vice President and Treasurer, Ms. Susan Mayer, entitled "Location Of The Debtors' Substantial Assets In The United States, And The Nature, Location, And Value Of Any Assets Held By The Debtors Outside The Territorial Limits Of The United States," filed with the WorldCom bankruptcy petitions (Jointly Administered Cases Nos. 02-13532 and 02-13533, United States Bankruptcy Court Southern District Of New York), provides:

> Substantially all of the Debtors' corporate books and records are located at the corporate headquarters of WorldCom, Inc., 500 Clinton Center Drive, Clinton, Mississippi 39056.

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[1] It is noted that certiorari was also denied in *Lowenschuss* at 517 U.S. 1243 (1996).

> WorldCom has assets in every location from which it operates its businesses, including every state domestically and 65 foreign countries in North America, Europe, the Middle East, Africa, Latin America, Australia and Asia.

See that court's website (http://www.nysb.uscourts.gov/) (WorldCom Inquiries) at http://www1.worldcom.com/external/infodesk/pdfs/1007_affidavit.pdf.

Collier comments on the venue requirements set forth in §1408 of Title 28, U.S.C.:

> The venue provision looks to the domicile, residence, principal place of business or place of principal assets in the United States. Section 1408 and Federal Rule of Bankruptcy Procedure 1014 recognize that the debtor's principal place of business may not be the location of its principal assets. When the debtor maintains its executive offices in one jurisdiction and its production facilities or other principal assets in another, either location may be a proper venue if the debtor's affairs are actually managed from the executive offices.

Collier on Bankruptcy, 15th Ed., ¶1014.02 [1].

The WorldCom filing is further support for petitioners' argument that the Circuit split on the issue of whether bankruptcy courts have authority to discharge non-debtors may be leading to a form of forum shopping which is particularly inimical to the national interest (Petition, p. 13).

Respectfully Submitted this 29th day of July, 2002.

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